(1)

90-338

IN THE SUPREME COURT OF THE
UNITED STATES

WILLIAM H. COFFEY
Petitioner,

v.

PSLJ, INC.
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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STATEMENT OF ISSUES PRESENTED

1. Whether the Fourth Circuit Court of Appeals interpretation of governing rules regarding an appeal from the Bankruptcy Court to a District Court is inconsistent with the language and purposes of the amendment to the rules. Whether the Fourth Circuit Court of Appeals and District Court interpretation of the rules governing appeals from the Bankruptcy Court to the District Court is inconsistent or conflicts with the decisional law of other federal circuits.

2. Whether the Fourth Circuit Court of Appeals affirmance of the District Court dismissal of an appeal due to an alleged procedural default is mandatorily required as a sanction even though the dismissal was for a non jurisdictional reason.

3. Whether imposition of a sanction for a procedural default should take into consideration whether

the brunt of a sanction should be properly borne by the litigant or his counsel.

PARTIES TO THE PROCEEDING

Petitioner, William H. Coffey, was the appellant below on the issues presented for review. Respondent, PSLJ, Inc., Debtor, was the Appellee below and on the issues presented for review.

Petitioner certifies that the following named parties appeared in the proceedings below:

Wiliam H. Coffey
Plaintiff-Appellant

PSLJ, Inc.
Debtor-Appellee

Phyllis Anderson
Defendant-Dismissed

Leroy Taylor
Defendant-Dismissed

William Boehm
Defendant-Dismissed

Howard Brown
Defendant-Dismissed

William MccGill
Defendant-Dismissed

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IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM H. COFFEY

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

William H. Coffey, Petitioner, by his attorneys, hereby submits the within Petition seeking discretionary review of the issues raised here.

OPINION BELOW

The opinion of the United States Court of Appeals, Fourth Circuit, (Appendix, *infra*, pp. 1-3), was not reported.

JURISDICTION

The judgment of the Court of Appeals (Appendix, p. 1, *et seq.*), after Petition for Rehearing In Banc, was denied and entered on May 24, 1990 and June 20, 1990 respectively. The jurisdiction of this Honorable Court is invoked pursuant to the Judicial Code, 28 United States Code, Section 1254(1) and Section 2101(c).

STATUTORY PROVISIONS INVOLVED

1. Pub.L. 98-353, Title I, §104(a), July 10, 1984, 98 Stat. 341, 28 United States Code §158, provides in relevant part:

(a) The district court of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

* * *

(c) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the court of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d) The courts of appeals shall have jurisdiction of appeals from all final decisions,

> judgments, orders, and decrees entered under subsections (a) and (b) of this section.

2. Pub.L. 88-623, Section 1, October 3, 1964, 78 Stat. 1001, as amended, 28 United States Code Section 2075 provides:

> The Supreme Court shall have the power to prescribe by general rules the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under Title 11.
>
> Such rules shall not abridge, enlarge, or modify any substantive rights.
>
> Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May and until the expiration of ninety days after they have been thus reported.

STATEMENT

1. This case presents for review by the Court consideration of the rules it has formulated pursuant to the process authorized by Title 28, U.S.C. §2075. The Rules of Bankruptcy Procedure, Part VIII, pertinent to the procedures for appeals, both to the federal district courts and to bankruptcy appellate panels, are here stated to have been improperly applied and contrary to governing judicial authority. On appeal to the District Court from an adversary proceeding decided against the Petitioner, by the Bankruptcy Court, was dismissed for a nonjurisdictional, procedural default or, due to Petitioner's failure to file a brief before the District Court within fifteen (15) days, Bankruptcy Rule 8001 and Rule 8009. Each of the respective federal circuit courts, with the exception of the Fourth Circuit Appeals Courts, have rendered a rule pertinent to the interpretation or breathe of Rule 8001 when construed

with Rule 8009. No federal circuit court, with the exception of the instant case involving Petitioner, has dismissed or affirmed a dismissal of an appeal, *due to the failure to file a brief on appeal without regard to the time involved or the circumstances advanced to justify the failure*. Moreover, no definitive guidelines or procedures exists among the federal circuits as to the appropriate test to employ when confronted with an alleged failure to follow the bankruptcy appellate rules. Indeed, no federal circuit has, with the instant case excepted, affirmed a dismissal of an appeal without analysis of fault, whether of the litigant or his counsel.

2. Petitioner, William Coffey, filed a Complaint in the United States Bankruptcy Court, for the District of Maryland, alleging that he possessed equitable and ownership rights in the Debtor's, PSLJ, Inc.'s asset, an apartment complex. The claims embodied in the adversary proceeding sought the dollar

amount of approximately $300,000.00. The Debtor, pursuant to a plan of liquidation under Chapter 11 of the Bankruptcy Court had sold the apartment complex and has liquid assets in the approximate amount of $1,700,000.00. The Petitioner alleged that he was a general creditor based upon substantial loans made to the Debtor and in the years prior to seeking relief under the Act.

3. The adversary trial of Petitioner's claims was tried before the Bankruptcy Court. The bench trial extended for five (5) days, and Petitioner's evidence was presented by ten (10) witnesses and was inclusive of sixty (60) trial exhibits. After Petitioner had rested his case, the Court entertained a motion pursuant to Federal Rule of Civil Procedure 41 seeking dismissal. The trial was discontinued pending the filing of memorandum. Nearly five (5) months later, the Bankruptcy Court entered its finding of fact and

conclusions of law dismissing the Petitioner's claims. The trial court prepared a lengthy "abstract" of the trial, however, the trial court determined, *inter alia*, and notwithstanding Petitioner's protracted and voluminous evidentiary presentation, that the Petitioner had not presented sufficient proof to recover, that Petitioner's evidence was in conflict, and that the claims were barred by the period of limitations under governing Maryland law.

On October 30, 1989, the Petitioner filed a timely Notice of Appeal and to the District Court, 28 U.S.C. §158(a), Bankruptcy Rules 8001(a) and 8002(a). Thereafter, Petitioner filed, in further compliance, a Statement of Issues, and a Designation of the Record, Rule 8006. Petitioner reserved the right, in his Statement of Issues to amend or modify the grounds for appeal after preparation of the trial transcript (notes of testimony). Petitioner deemed this step essential in

view of the apparent de novo review provided for factual findings on appeal and before the District Court, Bankruptcy Rule 8013. Further, in view of the alleged conflict in the Petitioner's evidence, the alleged insufficiency of the evidence, and the need for factual review on the mixed law-fact question of the applicability of the period of limitations the transcription of the trial transcript was deemed essential, see e.g., Fed.R.App.P. 10(b)(2).

4. The appeal was docketed in the United States District Court on November 22, 1989. However, Petitioner was unable due to financial circumstances and the initial lack of certainty as to costs, to pay for the voluminous trial transcript until December 6, 1989. Pursuant to Bankruptcy Rule 8009(a), Petitioner's appellate brief was due within fifteen (15) days after docketing in the District Court, or, the brief was due on December 8, 1989. On December 12, 1989, a mere four

(4) days after the Petitioner's brief was due, he filed a Motion for Enlargement of Time, *nunc pro tunc*. On December 13, 1989, the District Court, by the Honorable Joseph Howard, Jr., entered a memorandum decision and order dismissing the appeal for failure to file a brief within fifteen (15) days (Appendix, *infra*, pp. 5-8).

5. The District Court decision held that Petitioner's counsel has failed to timely file his brief and that counsel had not shown "good cause" for an enlargement of time. The District Court determined that Petitioner's counsel's experience in appellate matters coupled with the date indicated in the Docketing Notice, issued by the Clerk of the Court put the blame upon counsel. Petitioner had urged the District Court to grant more time due to the stated need for a trial transcript. The District Court deemed the assertion of the need for a transcript to not show

good cause. Moreover, the Court reasoned, no extension of time was necessary as "... no transcript was...required for an appeal...," citing Bankruptcy Rule 8007. Bankruptcy Rule 8007 does not dispense with a stated or actual need for a trial transcript. The Bankruptcy Court had prepared a trial evidence abstract, however, no bankruptcy rule required resort to the abstract, to the exclusion of the actual verbatim trial proceedings.

It is noteworthy that an appeal to a bankruptcy appellate panel requires the inclusion of an appendix, however, no such requirement exists for an appeal to a district court, Rule 8009(b). To the extent that the Rules of Bankruptcy governing appeals mirror the rules of appellate procedure, no sanction should be imposed for desiring the inclusion of a trial transcript,, Fed. Rule App. P. 30, and Rule 10(b)(2) and see, Advisory Committee Notes, Rule 8009.

The Petitioner timely perfected an appeal to the United States Court of Appeals, Fourth Circuit. On May 24, 1989, the appeals court issued its decision affirming the District Court dismissal for failure to prosecute (Appendix, *infra*, pp. 1-4). *The Court of Appeals decision is notably absent of any law or explanation for its determination*. The Panel was presented, by the Debtor, with evidence since the inception of the case before the Bankruptcy Court of instances, to it, of lack of diligence on the part of Petitioner or his counsel. No evidence of lack of diligence or prejudice exists on the record, with regard to the time period from the filing of the Notice of Appeal to the dismissal by the District Court, a period of twenty-two (22) days. Neither the District Court or the Appeals Court pronounced any test for determining when a dismissal is appropriate. The District Court ruling speaks to a failure to show good cause, while the

when a dismissal is appropriate. The District Court ruling speaks to a failure to show good cause, while the Court of Appeals addressed the question in terms of lack of diligence but on a record spanning nearly four years, including the relevant appeal period, Rule 8009.

The Courts, below, did not address the other issues pertinent to consideration of Rule 8001. Rule 8001 requires that the failure to take any step other than the filing of an appeal is grounds for dismissal. However, Petitioner took every procedural step except the filing of a brief. The filing of a Notice of Appeal is a jurisdictional requirement to perfecting an appeal, however, the failure to file a brief is not a jurisdictional prerequisite to the validity of an appeal. Dismissal is not automatically required. A rule or interpretation contrary to the view militating against automatic dismissal represents the majority rule. Furthermore, principles of equity, and risk of loss as between a

federal jurisprudence. If bankruptcy practice and procedure is to model the practice in Article III courts, or the federal appeals courts, than consideration of a sanction and less drastic alternatives, coupled with the reasoning in support of the sanction imposed, whether upon counsel or his client, requires that this Court provide guidance and ensure uniformity, *In Re Hill*, 775 F.2d 1385, 13 BCD 1327 (9th Cir. 1985); Fed.R.App.P. 31(c).

REASONS FOR GRANTING REVIEW

1. The Fourth Circuit Court of Appeals interpretation of appellate rules of procedure regarding bankruptcy appeals is inconsistent with the language and purpose of the rules and conflicts with the law of other federal circuits.

It is fundamental that procedural rules are promulgated so as to insure judicial economy. This Honorable Court has promulgated rules for the orderly progression of bankruptcy appeals, Rules 8001, *et seq.*,

28 U.S.C. 2075. The Bankruptcy Court is given authority to dismiss an appeal for the untimely filing of a notice of appeal or, when an appellant has done nothing more than file a notice of appeal, Rule 8001. However, the dismissal by complete reliance on a non Article III court's findings and conclusions, or without regard to the actual trial testimony defeats the essential attributes of judicial power of appellate review inherent in the district court, Bankruptcy Rule 8013. Under such circumstances, the grant of *de novo* review is a mere facade, *Northern Pipeline Constit. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 56 (1982).

Each of the respective federal circuit courts has considered the propriety of a dismissal for failure to prosecute pursuant to Rule 8001, and Rule 8009. Each Court has determined that an automatic rule of dismissal is inappropriate, e.g., *In Re Russell*, 746 F.2d 1419 (10th Cir. 1984). The bankruptcy rules do not

provide a rule or guide as to what should occur. No federal circuit court has affirmed a dismissal for a failure to prosecute or file a brief in a bankruptcy appeal for a period of time less than one (1) week. Such a "rule" is akin to an automatic dismissal for failing to file a brief within the requisite fifteen (15) day period, *In Re Tampa Chain Co.*, 835 F.2d 54 (1st Cir. 1987), dismissal affirmed after seven (7) months, but counsel failed to provide the court with any response on a show cause order. *In re AOV Industries*, 798 F.2d 491 (D.C. Cir. 1986), dismissal proper, but only after failure to file a brief for nine (9) months and the appellant there violated a court order by failing to respond to a motion to dismiss. *In re Braniff Airways*, 774 F.2d 1303 (5th Cir. 1985), failure to file a brief after nineteen (19) months, but gross negligence shown on counsel's part.

The common theme in the decisional law is not to test the failure to file a brief by a good cause or

excusable neglect standard, but by a determination of whether bad faith, negligence or indifference exists, whether the other procedural steps of the appeals process, (designating record and statement of issues filed) have been met, and whether the brunt of the burden of the sanction should be borne by the attorney or the party-litigant, *In re Beverly Mfg. Corp.*, 778 F.2d 666 (11th Cir. 1985); *In re Winner*, 632 F.2d 658 (6th Cir. 1980); *In re Comero*, 716 F.2d 168, 177 (3rd Cir. 1983). Indeed, a showing of prejudice to the opposing party is also deemed relevant, *Cournoyer v. Lincoln*, 53 B.R. 478 (D.R.I. 1985), *aff'd*, 790 F.2d 971 (1st Cir. 1986), five months in absence of prejudice not deemed offensive to the rule.

The Fourth Circuit, as noted, has not definitively ruled on a failure under Rule 8009, Rule 8001. However, where the issue of administration of the bankruptcy law and rules reveals a wide divergence in

application, this Honorable Court should act, *Reading Co. v. Brown*, 391 U.S. 471 (1968). A conflict in the interpretation or breathe of procedural rules dictates guidance from the court, *Schlagenhauf v. Holder*, 379 U.S. 104 (1964), *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982).

2. The Fourth Circuit Court of Appeals rule or interpretation that an automatic dismissal of an appeal from a bankruptcy court to a district court is required for an alleged procedural default which is nonjurisdictional, conflicts with the language and purpose of this Court's rules of bankruptcy procedure

The rule that dismissal of a bankruptcy appeal for failure to file a brief based upon the strict construction of an excusable neglect-good cause standard is poor law. What constitutes good cause for an act or failure of an act would appear to require at least as much as would be required to show excusable neglect, *In re Hatch*, 93 B.R. 263 (B.Ct. D. Utah 1988). Thus simple inadvertence, mistake of counsel or

ignorance of the rules will not suffice, *In re Magouirk*, 693 F.2d 948 (9th Cir. 1982).

The Courts below erred by applying a strict construction of Bankruptcy rule 8001 and 8009. Whether one views the dismissal here under a good cause standard as an "appellate transcript was unnecessary" (the District Court) or whether the dismissal was proper under a purported excusable neglect standard as Petitioner "failed to timely order a transcript," (Court of Appeals), a rule which ignores practical circumstances is draconian. One commentator, in analyzing the case law has discerned that dismissal is "an especially drastic remedy reserved for rare occasions," Norton, *Bankruptcy Law & Practice*, Rule 8009, p. 762, citing *Merker v. Rice*, 649 F.2d 171 (2nd Cir. 1982). First, absent here is any consideration of a less severe sanction. The rule of automatic dismissal predicated upon meager evidence of lack of

diligence ignores the time needed to determine the cost of a lengthy (by bankruptcy court standards) trial transcript. Moreover, the cost of the transcript, which was in excess of $2,000.00 was not a small sum for a litigant to obtain.

A clear indicator that the instant case was not the appropriate "rare" case for dismissal is that a less severe sanction was never considered. The respective federal courts have imposed monetary sanctions on counsel, *Hoffman v. Alside*, 596 F.2d 822 (8th Cir. 1979), or denied oral argument, *Hewitt v. Jarrard*, 786 F.2d 1082 (11th Cir. 1986). *See*, *Stotler & Co. v. Able*, 837 F.2d 1425 (7th Cir. 1988). A complete dismissal without regard to the exigencies of the case is a manifest injustice.

3. The imposition of a sanction for a procedural default should include a determination as to the need for any

> sanction and should be borne by the responsible offender.

The unjust result reached here is manifested by the failure of the courts below to determine if counsel or the Petitioner should bear the brunt of the dismissal. The District Court decision seeks to place the "blame" for the failure to file a brief upon counsel. The Court of Appeals decision predicates responsibility due to the Petitioner's purported failure. However, in view of the substantial sums of money involved, the notable lack of prejudice to the Debtor by allowing the brief to be filed, and no real extended delay, a dismissal of the appeal did not promote the ends of justice. A true analysis of the facts and law, although the decisions vary from circuit to circuit, required analysis of fault and an explanation by the Courts as to why, among the available alternatives, the sanction of dismissal was imposed. A cogent discussion of the proper allocation of blame and reasoning to support the review of various

sanctions is contained in the Ninth Circuit decision, *In re Hill, supra.* As the Hill court stated:

> The "why" the particular sanction was imposed ...related to the selection of the person against whom it is to be imposed and the choice of appropriate sanctions...

If the default was the fault of the attorney and not the litigant than dismissal is severe. The Court, in *Hill*, determined absent any analysis of the impact of the sanctions and assessment of penalties in conformity with fault, an abuse of discretion had occurred under Rule 8001 and Rule 8009. In accord, *In re Russell*, 746 F.2d 1419 (10th Cir. 1984).

In the instance case, neither court fully considered the impact of the dismissal upon the litigant-Petitioner. The lower courts as noted, did not consider any alternative sanctions or the propriety of a sanction at all. An abuse of discretion occurred in this case.

NATIONAL SIGNIFICANCE OF CASE

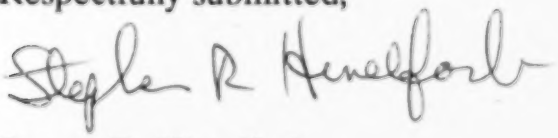
The Petitioner seeks review due to the drastic departure by the courts below from the accepted and usual course of procedural practice. The Court of Appeals did sanction the departure by the District Court such as to require that this Court exercise its power of supervision, Sup.Ct. Rule 17. The bankruptcy policy of expedition in bankruptcy proceedings must be balanced against the need for deliberated review of appeals, the costs to litigants and uniformity in decisions. This Court's authority to promulgate rules of practice or procedure in the area of appeals generally and specifically bankruptcy matters, begs for uniformity by a standard in which to judge the conduct of litigants and their counsel. Indeed, varying results in the assessment of a purported procedural default indicate the need for guidelines. To the extent that bankruptcy appellate practice is the mirror image of appellate

practice before the federal appeals courts, it is clear that delays in the filing of briefs for periods of time in excess of six (6) months cannot be expeditious practice. A rule which allows a dismissal as a sanction for failure of less than a week is equally deserving of review for efficiency and propriety. The instant Petition presents issues of apparent first impression to this Court. The goals of uniformity of decision, avoidance of any threat to practice and procedure within the lower federal courts, and, promotion of judicial economy clearly indicates the need for review by this Court.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have forwarded, this 23 ~~22~~nd day of August, 1990, by first-class mail, a copy of the foregoing Petition for Writ of Certiorari, by the following parties of record:

Curtis C. Coon, Esquire
Sandon Cohen, Esq.
Cohan & Francomano
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Baltimore, MD 21201

Steven R. Himelfarb

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2863

In Re: PSLJ, INC.,

Debtor.

WILLIAM H. COFFEY,

Plaintiff-Appellant,

versus

PSLJ, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Joseph C. Howard, District Judge. (CA-89-3163-JH)

Submitted: April 17, 1990

Decided: May 24, 1990

Before PHILLIPS, MURNAGHAN, and WILKINSON, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Herbert A. Terrell, SPEIGHTS & MICHEEL, Washington, D.C., for Appellant. Curtis C. Coon, Sandon L. Cohen, COHAN and FRANCMANO, P.C., Baltimore, Maryland, For Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

PER CURIAM:

In the case arising in bankruptcy, William H. Coffey asserted several claims against the debtor, PSLJ, Inc., in the United States Bankruptcy Court for the District of Maryland. Judge James F. Schneider, after a full trial, dismissed the case on several grounds. After

noting an appeal, Coffey neglected to file his brief within the time allowed. Failure to do so by Bankruptcy Rule 8001(a) exposed Coffey to such action as should be deemed appropriate, including dismissal of the appeal. After the passage of the due date for filing a brief, the district court dismissed the appeal for lack of prosecution.

Coffey now appeals, emphasizing that he was only "a few days late" and urging the absence of bad faith,, negligence, or indifference on his part. A review of the record, however, reveals a pattern of conduct not conducive to relief from Coffey's failure to cut square corners. A transcript which he deemed necessary was ordered by him in too short a time to receive it for timely filing. When the time for the filing of the brief expired, Coffey neglected to seek an extension of time. There are other aspects suggestive of something more

than indifference, amounting to negligence on Coffey's part.

A bankruptcy matter has, in a great proportion of the cases, a greater, a heightened need for promptness of action. It is a time-honored statement that "justice delayed is justice denied," and the truth of the saying has particular application to a dilatory party in a bankruptcy proceeding. Grounds existed sufficient to make the court's determination to dismiss his appeal no abuse of discretion. The receipt now of a motion on Coffey's behalf for leave to file a reply brief out of time provides no occasion for changing our conclusion. Indeed, it reinforces it. Leave to file the reply brief out of time is denied.

Since the briefs (timely or not) and record have been sufficient to familiarize us with the case, we dispense with oral argument. Accordingly, the judgment is AFFIRMED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED

June 20, 1990

No. 89-2863

In Re: PSLJ, INC.,

Debtor.

WILLIAM H. COFFEY,

Plaintiff-Appellant,

v.

PSLJ, INC.,

Defendant-Appellee.

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Murnaghan.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

In Re: PSLJ, INC. BANKRUPTCY NO. 86-5-2426-JS

Debtor.

WILLIAM H. COFFEY,

Plaintiff-Appellant,

v. CIVIL NO. JH-89-3163

PSLJ, INC.

Defendant-Appellee.

MEMORANDUM OPINION

On November 22, 1989, the above-captioned appeal was docketed in the United States District Court for the District of Maryland. The appeal is from the October 24, 1989 dismissal of appellant's adversary complaint. The parties were advised by letter dated November 22, 1989 that briefs must be filed in

accordance with Bankruptcy Rules 8009 and 8010. Rule 8009(a)(1) provides that unless the district court excuses the filing of briefs, "[t]he appellant shall serve and file his brief within 15 days after entry of the appeal on the docket...."

Appellant has not made such a filing to date, and the Court has not excused the filing. Appellant is no newcomer to the bankruptcy appeals process in this Court (Civil No. JH-89-725) as well as the Fourth Circuit Court of Appeals (NO. 88-2187). In light of that bankruptcy appellate experience and the instructions contained in the November 22, 1989 letter, dismissal is appropriate. In re Har-dway House Statutory, Inc., 76 F.R.D. 204 (D.C. Mo. 1977); In re Tampa Chain Co., Inc., 835 F.2d 54 (2d Cir. 1987). Further, it appears the instant appeal was simply filed in order for appellant to move for yet another stay. (Paper No. 2).

Before dismissing this appeal sua sponte, the Court inquired into the status of appellant's brief. In response, appellant has filed a motion for enlargement of time. As an initial matter, the motion for an extension was filed after the date the brief was due, and could be denied as untimely. However, Fed. R. Civ. P 6(b) provides that a court, in its discretion, may enlarge time if good cause is shown.

Appellant provides two arguments to show cause for an enlargement. First, an enlargement is sought due to the pendency of the motion to say. (Paper No. 4 at 2). The motion to stay in no way affects the filing schedule of this appeal, nor does it even concern the merits of this appeal. Therefore, the pending motion does not constitute cause for an enlargement of time.

Second, counsel for appellant suggests that additional time is required to prepare a transcript. (Paper No. 4 at 2). If the transcript were not yet

prepared due to delays in the transcription process, an extension would certainly be warranted. However, it appears that appellant's own lack of diligence -- in not beginning the transcription process until December 6, 1989 -- is the cause for the delay. Because appellant waited two weeks after noting the appeal, and seven weeks after the Bankruptcy Court's decision to initiate a transcript, he will not how be heard to require an extension.

Denying the motion for an extension of time is further supported by the fact that no transcript is even required for an appeal, Bankruptcy Rule 8007, and a detailed abstract is already available.

The Court will enter a separate order.

/s/

Joseph C. Howard
United States District Judge

Date: December 13, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

In Re: PSLJ, INC. BANKRUPTCY NO. 86-5-2426-JS

Debtor.

WILLIAM H. COFFEY,

Plaintiff-Appellant,

v. CIVIL NO. JH-89-3163

PSLJ, INC.

Defendant-Appellee.

ORDER

In accordance with the Memorandum Opinion of even date, it is this 13th day of December, 1989, by the United States District Court for the District of Maryland,

ORDERED:

1) that appellant's motion for extension BE, and the same hereby IS, DENIED.

2) that the instant appeal BE, and the same hereby IS, DISMISSED for lack of prosecution;

3) that appellant's motion for stay BE, and the same hereby IS, declared MOOT;

4) that the Clerk CLOSE this case; and

5) that the Clerk mail copies for the foregoing Memorandum Opinion and this Order to counsel of record.

/s/

Joseph C. Howard
United States District Judge

BANKRUPTCY RULE 8001

MANNER OF TAKING APPEAL; VOLUNTARY DISMISSAL; EFFECT OF APPEAL TO COURT OF APPEALS

(a) Appeal as of Right; How Taken. An appeal from a final judgment, order, or decree of a bankruptcy judge to a district court or bankruptcy appellate panel shall be taken by filing a notice of appeal with the clerk of the bankruptcy court within the time allowed by Rule 8002. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the district court or bankruptcy appellate panel deems appropriate, which may include dismissal of the appeal. The notice of appeal shall conform substantially to Official Form No. 35, shall contain the names of all parties to the judgment, order, or decree appealed from and the names, addresses and telephone numbers of their respective attorneys, and be accompanied by the prescribed fee. Each appellant shall file a sufficient number of copies of the notice of appeal to enable the clerk of the bankruptcy court to comply promptly with Rule 8004.

(b) Appeal by Leave; How Taken. An appeal from an interlocutory judgment, order or decree of a bankruptcy judge as permitted by 28 U.S.C. §1334(b) or §1482(b) shall be taken by filing a notice of appeal, as prescribed in subdivision (a) of this rule, accompanied by a motion for leave to appeal prepared in accordance

with Rule 8003 and with proof of service in accordance with Rule 8008.

(c) Voluntary Dismissal.

(1) *Before Docketing.* If an appeal has not been docketed, the appeal may be dismissed by the bankruptcy judge on the filing of a stipulation for dismissal signed by all the parties, or on motion and notice by the appellant.

(2) *After Docketing.* If an appeal has been docketed and the parties to the appeal sign and file with the clerk of the district court of bankruptcy appellate panel an agreement that the appeal be dismissed and pay any court costs or fees that may be due, the clerk of the district court or bankruptcy appellate panel shall enter an order dismissing the appeal. An appeal may also be dismissed on motion of the appellant on terms and conditions fixed by the district court or bankruptcy appellate panel.

(d) Effect of Taking a Direct Appeal to the Court of Appeals

(1) *Dismissal of Pending appeal to the District Court or the Bankruptcy Appellate Panel.* On the filing of a notice of a direct appeal by agreement of the parties to the court of appeals under 28 U.S.C. §1293(b), the clerk of the bankruptcy court shall enter an order vacating any prior notice of appeal to the district court of bankruptcy appellate panel from the same judgment, order, or decree of the bankruptcy court, and, if the appeal to the district court or bankruptcy appellate panel has not been docketed, the clerk of the bankruptcy court shall enter an order

dismissing the appeal. If the appeal to the district court or bankruptcy appellate panel has been docketed, the clerk of the bankruptcy court shall forward to the clerk of the district or the clerk of the bankruptcy appellate panel a copy of the order vacating the notice of appeal and on receipt thereof the clerk of the district court or the clerk of the bankruptcy appellate panel shall enter an order dismissing the appeal.

(2) *Dismissal of Subsequent Appeal to the District Court or the Bankruptcy Appellate Panel.* If a notice of direct appeal under 28 U.S.C. §1293(b) is filed and thereafter a notice of appeal to the district court or bankruptcy appellate panel from the same judgment, order, or decree is filed, the clerk of the bankruptcy court shall enter an order dismissing the appeal to the district court or the bankruptcy appellate panel.

(3) *Appeal After Dismissal of Direct Appeal by Court of Appeals.* If the direct appeal under 28 U.S.C. §1293(b) is dismissed by the court of appeals on the ground that the judgment, order, or decree appealed from is not final, the appellant or cross appellant may, within 10 days of entry of the order of the dismissal in the court of appeals, file a notice of appeal, as prescribed in subdivision (a) of this rule, accompanied by a motion for leave to appeal prepared in accordance with Rule 8003 and with proof of service in accordance with Rule 8008.

BANKRUPTCY RULE 8006

Within 10 days after filing the notice of appeal as provided by Rule 8001(a) or entry of an order granting leave to appeal the appellant shall file with the clerk of the bankruptcy court and serve on the appellee a designation of the items to be included in the record on appeal and a statement of the issues to be presented. Within seven days after the service of the statement of the appellant the appellee may file and serve on the appellant a designation of additional items to be included in the record on appeal and, if the appellee has filed a cross appeal, the appellee as cross appellant shall file and serve a statement of the issues to be presented on the cross appeal and designation of additional items to be included in the record. A cross appellee may, within seven days of service of the statement of the cross appellant, file and serve on the cross appellant a designation of additional items to be included in the record. The record on appeal shall include the items so designated by the parties, the notice of appeal, the judgment, order, or decree appealed from, and any opinion, findings of fact, and conclusions of law of the court. If the record designated by any party includes a transcript of any proceedings or a part thereof, he shall immediately after filing the designation deliver to the reporter and file with the clerk of the bankruptcy court a written request for the transcript and make satisfactory arrangements for payment of its cost. all parties shall take any other action necessary to enable the clerk to assemble and transmit the record.

BANKRUPTCY RULE 8009

BRIEFS AND APPENDIX; FILING AND SERVICE

(a) Briefs. Unless the district court or the bankruptcy appellate panel by local rule or by order excuses the filing of briefs or specifies different time limits:

(1) The appellant shall serve and file his brief within 15 days after entry of the appeal on the docket pursuant to Rule 8007.

(2) The appellee shall serve and file his brief within 15 days after service of the brief of appellant. If the appellee has filed a cross appeal, the brief of the appellee shall contain the issues and argument pertinent to the cross appeal, denominated as such, and the response to the brief of the appellant.

(3) The appellant may serve and file a reply brief within 10 days after service of the brief of the appellee, and if the appellee has cross-appealed, the appellee may file and serve a reply brief to the response of the appellant to the issues presented in the cross appeal within 10 days after service of the reply brief of the appellant. No further briefs may be filed except with leave of the district court or the bankruptcy appellate panel

(b) Appendix to Brief. If the appeal is to a bankruptcy appellate panel, the appellant shall serve and file with his brief excerpts of the record as an appendix, which shall include the following:

(1) The complaint and answer or other equivalent pleadings;
(2) Any pretrial order;
(3) The judgment, order, or decree from which the appeal is taken;
(4) Any other orders relevant to the appeal;
(5) The opinion, findings of fact, or conclusions of law filed or delivered orally by the court and citations of the opinion if published;
(6) Any motion or response on which the court rendered decision;
(7) The notice of appeal; and
(8) The relevant entries in the bankruptcy court docket.

An appellee may also serve and file an appendix which contains material required to be included by the appellant but omitted by appellant.

(2)

No. 90-338

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

WILLIAM H. COFFEY

Petitioner,

v.

PSLJ, INC.

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether any inconsistency of national significance exists by virtue of the dismissal of a bankruptcy appeal due to the untimely filing of brief by an Appellant who has shown a pattern of bad faith conduct?

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Statutes

I. STATEMENT OF ISSUES PRESENTED

1. Is an important issue of National Significance raised when a U.S. district court dismissed an appeal from a bankruptcy court because the appellant, who has consistently engaged in bad faith and dilatory conduct, and failed to timely file a brief due to fault of both counsel and the party?

II. STATEMENT OF CASE

In November, 1986, PSLJ, INC. filed a voluntary petition seeking relief under Chapter 11 of the United States Bankruptcy Code (Title 11, U.S.C.). In April 1987, PSLJ sold its asset, the Sarril Apartments, pursuant to an order of the bankruptcy court. In March, 1988 the bankruptcy court, without opposition from a single creditor, confirmed PSLJ's Chapter 11 Plan of Liquidation.

In December 1986, appellant, William H. Coffey (hereinafter "Coffey") instituted an adversary proceeding in the bankruptcy court against PSLJ and its current and former principals.[1] The litigation of this matter in the bankruptcy court lasted three years, involved extensive discovery and motions practice and culminated in a trial at which Coffey's case spanned five days.

Judge Schneider has prepared extensive findings of fact and conclusions of law (13 pages), and a detailed, fifty-eight page trial synopsis.

During the course of the proceedings, Coffey and his attorneys

---

[1]In April 1987 the bankruptcy court ruled that it lacked jurisdiction over all defendants except the debtor, PSLJ. The district court (Howard, J.) and the Fourth Circuit Court of Appeals(Case No. 88-2187) affirmed that decision. Coffey proceeded against PSLJ only.

have exhibited a pattern of dilatory conduct and disregard for procedural rules and standards of professional conduct. The following are examples of this pattern.

A. In his original complaint, Coffey named as defendants certain parties even though the complaint stated absolutely no claims for relief against them. The bankruptcy court assessed attorney's fees against Coffey's counsel, due to this violation of Bankruptcy Rule 9011 (analogous to Fed. R. Civ. P. 11).

B. The trial (after postponement was granted on Appellant's request) was scheduled to begin on Monday, January 30, 1989. On Friday, January 27, Coffey's present counsel, Herbert A. Terrell, Esquire filed a second amended complaint and a motion for leave to so amend. As PSLJ's counsel recounted to the bankruptcy court on the morning of

January 30, Mr. Terrell declared to PSLJ's counsel when serving the papers, "Here's a monkey wrench for you!"

C. On March 13, 1989, while the trial was in recess, Coffey filed in the district court a complaint and a motion for a temporary restraining order against PSLJ, its principals and a creditor, asserting the same claims as were being litigated before the bankruptcy court and seeking to prevent PSLJ from performing its confirmed Chapter 11 Plan of Liquidation. The district court (Howard, J.) denied injunctive relief, recognizing the bankruptcy court's jurisdiction over these matters, and subsequently dismissed the proceedings. The bankruptcy court first learned of the filing of the district court complaint on March 21,

1989, when the trial resumed, from PSLJ's counsel.[2]

D. Such behavior has continued in the proceedings before the Fourth Circuit Court. Coffey's attorney failed to serve a motion filed in the Fourth Circuit Court upon counsel for PSLJ and failed to include complete and accurate certificates of service upon other papers, for which he was admonished. See Appendix at p.2. Amazingly, despite the grief that failure to file a brief in the district court has caused, Coffey failed to file his brief in the Fourth Circuit Court of Appeals until it was twenty days past due and failed to provide an excuse that this Court found acceptable. See Appendix, p. 2.

---

[2]Subsequently, the bankruptcy court found Mr. Terrell in contempt for his behavior in attempting to usurp that court's jurisdiction; that finding and fine were confirmed by the district court (Garbis, J.).

At the conclusion of Coffey's case, PSLJ moved to dismiss the case pursuant to F.R.Civ. P. 41(b) and Bankruptcy Rule 7041. Prior to ruling on the motion, Judge Schneider reviewed all of the testimony and prepared the 58-page trial synopsis and a thirteen pages of finding of fact and conclusions of law. On October 24, 1989, Banruptcy Judge Schneider granted the motion to dismiss.

On October 30, 1989, Coffey noted an appeal to the district court of Judge Schneider's order dismissing the case. Coffey neither filed a brief within the allotted time nor sought an extension of time to file within that time as allowed by Bankruptcy Rule 9006(b). Although Coffey had opted to include a transcript of the trial in the record on appeal to the district court, the transcript of the five day trial was not even ordered until December 6, 1989, the day before the

brief was due. After the due date for the filing of his brief had passed, the district court, sua sponte, inquired into the status of the matter. Coffey's response to the inquiry was to the file an untimely motion seeking an extension of time on grounds that the district court had not yet ruled upon his motion to stay proceedings in PSLJ's bankruptcy case and that the transcript had not yet been obtained. District Judge Howard found these excuses untenable and dismissed the appeal for lack of prosecution. Judge Howard also took into account the motive of the appellant, being to obtain a stay of the bankruptcy proceedings where identical relief had previously been denied. See Memorandum Opinion of Howard, J. (Petitioner's appeal).

Coffey's appeal to the Fourth Circuit Court of Appeals followed. The

Fourth Circuit expressly noted Coffey's "failure to cut square corners", and observed his pattern of conduct as contrary to his professed lack of bad faith, negligence or indifference. The opinion of the Fourth Circuit is unpublished.

ARGUMENT

I. THE BANKRUPTCY RULES OF PROCEDURE EXPRESSLY AUTHORIZED THE DISMISSAL OF COFFEY'S APPEAL

Part VIII of the Bankruptcy Rules of Procedure (Rules 8001-8019) governs appeals from decisions of bankruptcy judges to the United States District Courts and bankruptcy appellate panels. Rule 8001(a) provides in pertinent part as follows:

> Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the district court or bankruptcy appellate panel deems appropriate, which

> may include dismissal of the appeal.

(Emphasis added)

One of the steps that the appellant must take to perfect his appeal is the filing of his principal brief. Bankruptcy Rule 8009(a)(1) provides that, unless the district court by rule or order specifies different time limits, the appellant must "serve and file a brief within 15 days after entry of the appeal on the docket pursuant to Rule 8007."

Rule 403 of the Local Rules of the United States District Court for the District of Maryland amplifies the provisions of Part VIII of the Bankruptcy Rules. The third paragraph of that rule provides as follows:

> Dismissal for Non-Compliance with Bankruptcy Rule 8009
>
> Whenever the appellant fails to serve and file a brief within the time required by Bankruptcy Rule 8009, the District Court

> may, upon motion of the appellee (to be filed in the District Court) or upon its own initiative, dismiss the appeal.

(Emphasis added.)

These rules are entirely consistent with what this Court has described as a court's "inherent discretionary power to dismiss an action for want of prosecution." Steyr-Daimler-Puch of America Corp. v. Pappas, 852 F.2d 132, 134 (4th Cir. 1988).

The district courts and bankruptcy appellate panels have exercised the authority granted by Bankruptcy Rule 8001(a) and its predecessors in dismissing bankruptcy appeals where the appellants have failed to abide by the rules. In First National Bank of Maryland v. Markoff, 70 B.R. 264 (S.D.N.Y. 1987) is remarkably like the present case. In Markoff, the district court dismissed the appeal where the

appellant had failed to file its brief, had failed to seek an extension of time and argued in opposition to the appellee's motion to dismiss that it could not file its brief until it had obtained a transcript of the bankruptcy proceedings.

Also strikingly similar to the instant case are the cases of West v. Falconer, 17 B.R. 929 (S.D. Ill. 1982), where the appeal was dismissed after the appellant failed to provide for transmittal of the transcript on time, file a brief on time or seek an extension of time; and In re WHET, Inc., 19 B.R. 1022 (1st Cir. BAP 1982), where the appellant had also failed to file its brief on time due to an alleged inability to obtain transcripts and suffered dismissal of the appeal as a consequence. See also Lawless v. Central Production Credit Association, 81 B.R. 475 (S.D.

Ill. 1987) (Appellants had failed to file their brief and had repeatedly ignored orders of the bankruptcy court and the district court); In re Quevedo, 35 B.R. 117 (D. Puerto Rico 1983) (Appeal dismissed where brief was filed 10 days arter it was due); In re Har-dway House Statuary, Inc., 76 F.R.D. 204 (E.D. Mo. 1977) (Appellant failed to file brief or seek extension of time).

Decisions of district courts ordering appeals dismissed for noncompliance with the rules have been upheld on appeal. See In re Tampa Chain Company, Inc., 835 F.2d 54 (2d Cir. 1987); Greco v. Stubenberg, 859 F.2d 1401 (9th Cir. 1988).

Notwithstanding his flagrant disregard for the applicable rules of procedure and the plain language of Bankruptcy Rule 8001(a) authorizing dismissal, Coffey contends that it was an

abuse of discretion for the district court to dismiss his appeal.[3] Coffey yearns for an interpretation from this Court that his conduct was merely "excusable neglect", and that such should never constitute grounds adequate for dismissal. Coffey relies upon decisions from other circuits that hold that dismissal may be inappropriate where the fault in noncompliance with the rules lies entirely with the appellant's attorney and not with the appellant. See, e.g. In re Hill, 775 F.2d 1385 (9th Cir. 1985). It has been held by other courts that dismissal is an appropriate sanction for failure to comply with the rules only when bad faith, negligence or indifference has been shown. See In re

[3]Apparently recognizing the frivolity of his argument before the district court that a ruling upon his motion to stay would be required before he could file a brief, Coffey later abandoned that argument.

Beverly Manufacturing Corporation, 778 F.2d 666 (11th Cir. 1985), In re The Winner Corporation, 632 F.2d 658 (6th Cir. 1980). Coffey apparently contends the this court should adopt the standards such as those set forth In re Beverly Manufacturing and that, under such standards, the district court's action was an abuse of discretion. Coffey makes no room for the well-recognized principle that Bankruptcy appeals are, due to this nature, more expedited. Nor can he sustain such a test based upon his bad faith common negligence and indifference.

As the Fourth Circuit Court expressly found, "there are other aspects suggestive of something more than indifference, amounting to negligence on Coffey's part." (Petitioner's appendix at 4a).

In the instant case, Judge Howard, too, was quite familiar with Coffey's

case, having heard the appeal from the bankruptcy court's decision to dismiss the case as to the original defendants other than PSLJ. Judge Howard had also dismissed the recklessly filed injunction proceeding instituted by Coffey in the district court while the case was being tried before the bankruptcy court, as explained supra at 4. Judge Howard did not apply an "automatic" dismissal, as increduously argued by appellant; rather, District Judge Howard expressly recognized the foul odor of bad faith.

The effect of adopting Coffey's policy of casually challenging the discretion exercised by district courts in dismissing appeals would be to encourage counsel to take the rules less seriously and to increase the costs of litigation for the party who did not violate the rules. The exigencies and economic considerations involved in the

bankruptcy process and reflected by the Bankruptcy Rules would not be served by a ruling encouraging such appeals as this and discouraging the district courts from exercising the dismissal power expressly granted by Rule 8001(a). Coffey seeks to characterize Judge Howard's action as inappropriate because the dismissal was "automatic". (App. Pet. at 13). This is simply not so.

Coffey's explanation for the failure to order the transcript until the day before the brief was due is that "[d]ue to financial circumstances the trial transcript which cost nearly $2,600.00 was not paid for until December 6, 1989." Brief of Appellant before the Fourth Circuit Court at 6. Far from constituting an excuse for the delay, Coffey's failure to make satisfactory arrangements for the payment of the transcript immediately after designating

the transcript for inclusion in the record as required by Bankruptcy Rule 8006 indicates that the delay was not all the fault of his attorneys, as Coffey contends elsewhere in his brief.

A similar contention was made in Greco v. Stubenberg, where the Ninth Circuit affirmed the district court's dismissal of a bankruptcy appeal for failure to prosecute. Although the Ninth Circuit, consistently with its holding in Hill, took the view that a district court should consider "whether the conduct giving rise to the dismissal was caused entirely by the party's attorney" before ordering dismissal, the court recognized that a failure to provide funds to pay for transcripts is the appellant's own fault, not his attorney's. Id. at 1404. See also In re WHET, Inc., 19 B.R. 1022 (1st Cir. BAP 1982) (Appellant's failure promptly to order transcripts and to

provide court with proof that it had made arrangements for payment of transcription costs warranted dismissal of appeal.) Clearly, the delay here is substantially attributed to Coffey, but his attorney was believed by Judge Howard to have filed the appeal simply to move for yet another stay (Petitioner's appendix at 8A).

Of course, as Coffey has never filed his brief, it is impossible to say how late his brief would have been. However, as Coffey had just ordered the transcript of the five day trial, the day before the brief was due, it would obviously have been some weeks or months before a brief could be filed. Coffey's contention that the delay was insubstantial is thus without merit, it is speculation.

Part VIII of the Bankruptcy Rules is constructed so as to ensure quick administration of bankruptcy cases. See,

e.g. First National Bank of Maryland v. Markoff, 70 B.R. at 265. Forgiving Coffey for having neglected to make timely arrangements to obtain the transcript he desired would have thwarted the intent and purpose of the rules. As Judge Howard put it,

> [i]f the transcript were not yet prepared due to delays in the transcription process, an extension would certainly be warranted. However, it appears that appellant's own lack of diligence -- in not beginning the transcription process until December 6, 1989 -- is the cause for the delay. Because appellant waited two weeks after . . . [the docketing of] the appeal, and seven weeks after the Bankruptcy Court's decision to initiate a transcript, he will not now be heard to require an extension.

Memorandum Opinion of Howard, J. at 2-3 (App. 21-22)[4]

[4]The opinion states that Coffey waited two weeks after "noting" the appeal to initiate the transcript. The court obviously meant "docketing" rather than "noting," the notice of appeal having been filed on October 30, 1989, over five weeks prior to December 6.

Coffey argues that his perceived need for the transcript to prepare the brief in itself was justification for the prosecution of the appeal to be delayed until whenever he could pay for the transcript and have it prepared. This argument begs the question. If Coffey believed the transcript to be vital to a successful appeal - notwithstanding the lack of a showing of its necessity - he should have made the arrangements within the time provided by the rules or at least filed a timely motion seeking an extension of time to file a brief citing any legitimate problems he was

encountering in arranging payment.[5] In the absence of any such representations by Coffey, the district court was fully justified in concluding that the delay in ordering the transcript and failure to file the brief were without justification.

The pattern of misconduct of Coffey and his attorneys compels the conclusion that the dismissal was exactly what they deserved.

Despite prior sanctions imposed upon Mr. Terrell and upon his predecessor, Mr. Hairston, by the bankruptcy court, these abuses have

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[5]Coffey's argument on this issue is irrelevant to this appeal; moreover, it is not compelling. While Coffey contends that Judge Schneider's synopsis "is inadequate, incomplete and misleading," Brief of Appellant at 7, the issues he raises are issues of law, not fact. See Id. at 8. Coffey makes no mention of any facts that he contends Judge Schneider mischaracterized in the 58-page trial synopsis.

continued unchecked. As Judge Howard noted, Mr. Terrell had prosecuted a bankruptcy appeal on Mr.Coffey's behalf previously and obviously had familiarity with the rules. See Memorandum Opinion of Howard, J. at 1-2 (App. 20-21). Judge Howard also observed that the appeal was being used as a vehicle by which to seek a stay of PSLJ's bankruptcy proceedings that he had previously denied when such relief had been sought via an independent action. See Id. at 2 (App. 21). A finding of bad faith, negligence or indifference is thus implicit in Judge Howard's opinion and may in any event be found repeatedly in the record of these proceedings.

CONCLUSION

This Court should deny the Petition for a Writ of Certiori dismissing Coffey's appeal to that court from the

decision of the bankruptcy court.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2863

In Re: PSLJ, Inc.

Debtor

William H. Coffey

Plaintiff - Appellant

versus

PSLJ, Inc.

Defendant - Appellee

FILED

MAR 2 1990

U.S. Court of Appeals
Fourth Circuit

ORDER

Appellee has filed a motion to dismiss this appeal on the ground that appellant failed to timely file his brief and joint appendix. Appellant has filed a response to the motion to dismiss and has filed a motion for leave to file his brief out of time.

By order of December 29, 1989, appellant's brief and joint appendix were due on February 7, 1990. On January 26, 1990, this Court granted appellant's motion for leave to file a transcript of the bankruptcy proceedings. On the very date appellant's opening brief was due, appellant filed a motion asking that this Court supplement the record on

appeal and that appellant's brief be due *seven days* after the supplementation. On February 8, 1990, supplementation was granted but the request for an extension was denied. Nevertheless, appellant failed to file his brief for an additional *20 days*.

In appellant's motion for leave to file brief out of time, appellant's counsel explains that the delay in filing his brief was due to having to wait until a decision had been made on whether to allow the supplementation of the record with the transcript of the bankruptcy proceedings and the bankruptcy court decision. Counsel's explanation is not satisfactory because leave to file a transcript of the bankruptcy proceedings was granted on January 26 and leave to supplement the record with the bankruptcy court's decision was granted on February 8. Nevertheless, despite the substantial delay in filing of appellant's brief and joint appendix after this Court's explicit denial of a request for an extension, dismissal of appellant's appeal is too harsh a sanction.

Accordingly IT IS ORDERED that the motion for leave to file brief out of time is granted and the motion to dismiss is denied. Appellant's counsel is admonished to adhere strictly to all further scheduling orders of this Court. If appellant's counsel is responsible for any future delay in this appeal, his actions may result in the imposition of sanctions pursuant to Rule 46(c) of the Federal Rules of Appellate Procedure and I.O.P. 46.6.

For the Court - By Direction

JOHN M. GREACEN
CLERK

(3)

No. 90-338

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM H. COFFEY
Petitioner,

v.

PSLJ, INC.
Respondent.

REPLY AND SUPPLEMENTAL BRIEF TO THE OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES IN REPLY TO OPPOSITION TO THE PETITION

1. The Court should grant review to resolve a conflict among the respective federal circuits pertinent to the administration of bankruptcy appeals and to cure a departure, by the Fourth Circuit of Appeals, from the majority view regarding Bankruptcy Rule 8001 and Rule 8009.

2. Whether purported evidence of bad faith or negligence of a party and during the entire course of protracted litigation, has any bearing on whether, during the isolated course of a single appeal, a party has acted to not abide by the appellate rules.

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IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM H. COFFEY

Petitioner,

v.

PSLJ, INC.

Respondent.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

William H. Coffey, Petitioner, by his attorneys, hereby submits the within Reply and Supplemental Brief to the Opposition to the Petition seeking discretionary review.

OPINION BELOW

The opinion of the United States Court of Appeals, Fourth Circuit, (Appendix to Petition, *infra*, pp. 1-3), was not reported.

JURISDICTION

The judgment of the Court of Appeals (Appendix, p. 1, *et seq.*), after Rehearing In Banc, was denied, was entered on May 24, 1990 and June 20, 1990 respectively. The jurisdiction of this Honorable Court is invoked pursuant to the Judicial Code, 28 United States Code, Section 1254(1) and Section 2101(c). The instant reply and supplemental brief is filed pursuant to Supreme Court Rule 22.5 and 22.6.

STATUTORY PROVISIONS INVOLVED

Pub.L. 88-623, Section 1, October 3, 1964, 78 Stat. 1001, as amended, 28 United States Code Section 2075 provides:

> The Supreme Court shall have the power to

whereas, in another federal circuit, a mere week would result in a draconian dismissal of the appeal, without regard to the loss of potentially half a million dollars in claims.

3. The opposition to the Petition sets forth specific instances, beginning in 1986, and makes reference to incidents during the litigation on January 30, 1989, March 13, 1989, and August 20, 1990. (Opposition pp. 2-5). The only references by Respondent as to why the lower court decisions should be affirmed are the objective representations that the Bankruptcy Court prepared an abstract outline of the trial and hence militating against the need for a verbatim transcript, and, that the Bankruptcy Rule expressly provided for dismissal. Several truisms exist here. If the record on appeal is not complete, a party has a right to add or supplement the record. The Court of Appeals agreed (Respondent, Appendix). Second, no

reported decision exists allowing a federal appeals court to consider the record of three (3) separate but related cases inclusive of an appeal and spanning four (4) years to determine if a party during the limited appeals period (15 days here) has failed to prosecute. Finally, the inclusion of references to sanctions imposed upon a former counsel, an unrelated finding of contempt, and misleading references to appellate court orders are scandalous and impertinent.

REASONING IN SUPPORT OF PETITION

1. The Respondent is simply wrong to assert that Bankruptcy Rules 8001 and 8009 explicitly require dismissal for inability to file a brief. No automatic rule of dismissal exists. Respondent urges the Court to accept the view that the Fourth Circuit decision here was the product of, or due to fault of Petitioner and his counsel, *without regard to the rules and judicial interpretation of same*. No federal circuit court has

adopted such a rule or read the language of the pertinent rules to require the results reached below. The decision of *Greco v. Stubenberg*, 859 F.2d 1461 (9th Circuit 1988), and the lower court decision of *In re WHET, Inc.*, 19 B.R. 1022 (1st Cir. BAP. 1982), are not controlling authorities in the Ninth Circuit, *In re Hill*, 775 F.2d 1385 (9th Cir. 1985), nor in the First Circuit, *Cournoyer v. Lincoln*, 53 B.R. 478 (D.R.I. 1985), *affd.*, 790 F.2d 971 (1st Cir. 1986).

2. Aside from a discussion of the years of litigation engendered by the cases below, Respondent does not address how during the twenty-two (22) days following the docketing of the appeal, Petitioner acted in bad faith and was indifferent or negligent. The Respondent nowhere states how it has or was prejudiced, see *Cournoyer v. Lincoln, ante*, (five months in the absence of prejudice and brief not deemed untimely).

NATIONAL SIGNIFICANCE OF CASE

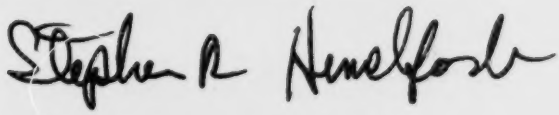
The Fourth Circuit Court of Appeals has no reported decision pertinent to the interpretation of Rule 8001 and Rule 8009. Each of the other federal circuits, in one fashion or the other, follows the tests set forth by the Sixth Circuit, *In re Winner, ante*. Other circuits have furthered the governing tests within their circuits by requiring a fault analysis, and by a rule which considers prejudice to the opposing party, whether the brunt of the sanction of dismissal should fall upon the attorney or his client, and which considers actual bad faith. Uniformity can only be established by this Court acting here. This Court has acted in the past to clarify and provide guidance in the special area of bankruptcy practice, *Maggio v. Zeitz*, 333 U.S. 56 (1948). Indeed, certiorari has been granted to consider the effect of procedural rules upon practice in the lower courts,

Sibach v. Wilson, 312 U.S. 1 (1941), *Reading Co. v. Brown*, 391 U.S. 471 (1968).

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have forwarded, this 1st day of October, 1990, by first-class mail, a copy of the foregoing Reply and Supplemental Brief to the Opposition to the Petition for Writ of Certiorari, by the following parties of record:

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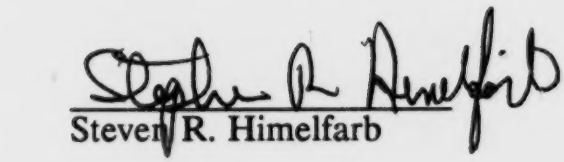

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